

D.T.E. 05-SL-10

August 19, 2005

Complaint filed by John K. Ober, pursuant to G.L. c. 93, §§ 108 et seq., with the Department of Telecommunications and Energy claiming that his local service was switched to Verizon New England, Inc., d/b/a Verizon Massachusetts, without authorization.

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I. INTRODUCTION

On May 18, 2005, John K. Ober (“Complainant”), pursuant to G.L. c. 93, §§ 108 et seq., filed a complaint with the Department of Telecommunications and Energy (“Department”) alleging that his local telephone service provider was switched from AT&T Communications of New England, Inc. (“AT&T”) to Verizon New England, Inc. d/b/a Verizon Massachusetts (“Verizon”) without authorization.¹ On July 27, 2005, pursuant to notice duly issued, the Department conducted an evidentiary hearing. The Complainant testified on his own behalf. Verizon offered the testimony of Christopher E. Bean, a senior specialist in regulatory affairs at Verizon. The record consists of one exhibit from the Complainant, 33 Department exhibits, and Verizon’s responses to four record requests.

II. POSITIONS OF THE PARTIES

A. Complainant

The Complainant asserts that he first became aware that his local telephone service had been switched from AT&T to Verizon when he received a bill from Verizon in April 2005 (Exh. DTE-20; Tr. at 13). The Complainant asserts that AT&T had been his chosen local service provider for at least one year prior to the alleged unauthorized switch in March 2005 (Tr. at 12-13, 39-40). The Complainant states that he did not authorize the switch of his local service provider from AT&T to Verizon either by signing a letter of agency (“LOA”) or by third party verification (“TPV”) (id. at 15, 22-23). The Complainant stated that he did

¹ Pursuant to 220 C.M.R. § 13.02, any unauthorized change to a customer’s primary interexchange carrier (“IXC”) or local exchange carrier (“LEC”) is known as “slamming.”

authorize a switch of his long-distance service provider by TPV recording from MCI to Sprint in March 2005, and that switch occurred on approximately the same date that his local service provider was switched from AT&T to Verizon (id. at 40-42).² In response to the TPV recording provided by Verizon to support its claim that the switch in local service providers was authorized, the Complainant stated that it was his voice on the TPV recording, but that he did not authorize any change of his local service provider in March 2004 (the date that Verizon claims the switch was authorized) (Tr. at 17, 57).³ The Complainant asserted that if he had authorized a switch from AT&T to Verizon in March 2004, he would have followed up with Verizon when the switch did not occur in a timely fashion (Exh. DTE-33; Tr. at 17-20, 70-71).

The Complainant states that, ultimately, his local telephone service provider was restored to his chosen provider, AT&T, after he placed several calls to AT&T and Verizon (see Tr. at 13, 28). The Complainant states that Verizon later credited him its local service charges resulting in a zero balance (Tr. at 38-39, 63).

² The Complainant is not disputing the switch of his long distance service provider from MCI to Sprint, and originally believed that the authorized switch of his long distance service provider was in some way related to the unauthorized switch of his local service provider given the fact that both switches occurred on the same day (Tr. at 12-13, 51-52).

³ As discussed below, according to Verizon, the TPV recording was recorded in March 2004, although the switch of the Complainant's local service provider did not occur until March 2005, one year later (Tr. at 43).

B. Verizon

Verizon asserts that the Complainant contacted Verizon on March 4, 2004, to have his local service switched to Verizon (Tr. at 43). Verizon states that the Complainant's request to switch his local service to Verizon was recorded and verified through a TPV on that date by Martin Partners, LLC, d/b/a Interactive Telesis ("Interactive Telesis") (id.; Exh. DTE-32). Verizon further states that, although the TPV authorizing the switch in the Complainant's local service provider from AT&T to Verizon was recorded on March 4, 2004, Verizon did not submit the request to change the Complainant's local service until March 5, 2005, one year later (Tr. at 43, 53-57).⁴ However, even though the switch was completed in March 2005, Verizon asserts that the switch of the Complainant's local service provider from AT&T to Verizon was authorized by the TPV recorded by Interactive Telesis on March 4, 2004 (id. at 43, 56-57, 61). Verizon states that, after it was contacted by the Complainant, Verizon processed the Complainant's request to switch his local service back to AT&T and credited the Complainant's account for \$39.45, the sum of all Verizon charges (id. at 43-44).

⁴ According to Verizon, the "due date" for the switch was erroneously typed in as March 5, 2005 rather than the correct date of March 5, 2004 (RR-DTE-VZ-2; Tr. at 43).

III. STANDARD OF REVIEW

Pursuant to 47 U.S.C. § 258(a), “[n]o telecommunications carrier shall submit or execute a change in a subscriber’s selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Federal Communications Commission (“FCC”) may prescribe. Nothing in this section shall preclude any State commission from enforcing such procedures with respect to intrastate services.”

Pursuant to G.L. c. 93, § 109(a), a change in a customer’s primary IXC or LEC shall be considered to be authorized only if the IXC or LEC that initiated the change provides confirmation that the customer authorized the change either through a signed LOA or oral confirmation of authorization through a TPV obtained by a company registered with the Department to provide TPV services in the Commonwealth. Pursuant to G.L. c. 93, § 110(i), upon receipt of a slamming complaint, the Department shall hold a hearing to determine, based on our review of the LOA or TPV and any other information relevant to the change in telephone service, whether the customer did or did not authorize the carrier change.

In addition to the Massachusetts slamming laws set forth above, the FCC implemented slamming liability rules in May 2000. See In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers’ Long Distance Carriers, CC Docket No. 94-129, First Order on Reconsideration, FCC 00-135 (rel. May 3, 2000) (“First Order on Reconsideration”). In accordance with those rules, consumers do not have to pay for service for up to 30 days after being slammed; any charges beyond 30 days must be paid but at the

rates charged by the company the consumer requested. First Order on Reconsideration at ¶¶ 7-14, 39; 47 C.F.R. § 64.1160(b). If an unauthorized switch is found to have occurred and the consumer has paid the bill, the company responsible for the unauthorized switch must pay the authorized company 150 percent of the charges it received from the consumer, and the authorized company will reimburse the consumer 50 percent of the charges the consumer paid to the slamming company. First Order on Reconsideration at ¶¶ 15-21, 42; 47 C.F.R. § 64.1170(b), (c). According to the FCC, state commissions should have primary responsibility for administering the FCC's slamming liability rules. First Order on Reconsideration at ¶¶ 22-28, 33-37, 52, 84. On November 3, 2000, pursuant to 47 C.F.R. § 64.1110, the Department provided to the FCC its State Notification of Election to Administer FCC Rules. See Letter to Magalie Roman Salas, Secretary, Federal Communications Commission (November 3, 2000).

IV. ANALYSIS AND FINDINGS

A. Introduction

As discussed fully in the following sections, we agree with the Complainant that his local service provider was switched from AT&T to Verizon without proper authorization because (1) the TPV failed to record an oral confirmation of the customer's authorization as required by G.L. c. 93, § 109(a), (c)(1), and (2) the TPV service provider Verizon used to verify the authorization for the switch in local carriers was not registered with the Department at the time of the TPV recording as required by G.L. c. 93, § 109(a); c. 159, § 12E. In

addition, we discuss whether the length of time between the recording of the TPV and the execution of the switch in this case (i.e., one year) was reasonable.

B. Requirement of Oral Confirmation

G.L. c. 93, § 109(a) provides that a change in a customer's local service provider shall only be considered to be authorized if the "LEC that initiated that change provides confirmation that the customer did authorize such change . . . through a signed LOA or oral confirmation of authorization obtained by a company registered with the department to provide TPV services in the Commonwealth" (emphasis added). The statute further states that a TPV "shall be accomplished by having a person talk directly to the customer to obtain oral confirmation that the customer did authorize a change in a primary IXC or LEC service for a particular telephone line identified." G.L. c. 93, § 109(c)(1) (emphasis added). Similarly, 47 C.F.R. § 64.1120(c) requires that

[n]o telecommunications carrier shall submit a preferred carrier change order unless and until the order has been confirmed in accordance with one of the following procedures . . . (3) An appropriately qualified independent third party has obtained, in accordance with the procedures set forth in paragraphs (c)(3)(i) through (c)(3)(iv) of this section, the subscriber's oral authorization to submit the preferred carrier change order that confirms and includes appropriate verification data (emphasis added).

As confirmation that the Complainant authorized the switch in local service providers, Verizon submitted an automated TPV recording which required the responding party to provide confirmation of authorization by pressing digits on the telephone key pad in response

to verification questions (i.e., “touch-tone responses”) (Exh. DTE-33).⁵ This is the Department’s first opportunity to determine whether touch-tone responses satisfy the requirement for “oral”⁶ confirmation and authorization required by both Massachusetts and federal anti-slamming law. For the following reasons, we conclude that it does not.

The FCC recently addressed this issue in Verizon Long Distance: Complaint Regarding Unauthorized Change of Subscriber’s Telecommunications Carrier, IC No. 04-S86027, Order, DA 05-138 (rel. January 26, 2005). In its order, the FCC’s Consumer Policy Division determined that because the subscriber was required to press digits in response to verification questions during a TPV, the FCC’s requirement for “oral authorization” was not met, and the actions of Verizon Long Distance resulted in an unauthorized change in service provider. Id. at ¶ 4.⁷ In addition, the rationale for requiring

⁵ The Department prepared a transcript of the TPV recording (provided by Verizon on audio cassette and entered into the evidentiary record as Exh. DTE-33), and includes it in its entirety as Attachment A to this Order. We, of course, rely on the audio recording in our fact-finding and legal conclusions. We include the attached transcript to clarify our order.

⁶ “Oral” is defined in Black’s Law Dictionary 1122 (7th ed. 1999), as “[s]poken or uttered; not expressed in writing.” See also Merriam-Webster’s Collegiate Dictionary 817 (10th ed. 1998). We construe, as we must, statutory terms “according to the common and approved usage of the language” (G.L. c. 4, § 6, cl. third), and it is clear that the Legislature intended “oral” to be taken as Black’s and Merriam-Webster’s have defined it and not as a touch-tone response to “aural” command or enquiry.

⁷ In May 2004, Verizon responded to the Department’s request for information on Verizon’s touch-tone response method of verification (see Letter from John L. Conroy, Verizon Vice President, Regulatory – Massachusetts, to Karen Robinson, DTE Consumer Division Director (May 6, 2004)). In the letter, Verizon asserted that its touch-tone response method of verification “is consistent with both federal and state

an independent confirmation of an authorization to switch providers is to be able to provide reviewing administrative agencies (either state commissions or the FCC) with proof that authorization did occur in the event that the switch is disputed.⁸ However, recordings of touch-tone responses do not provide the reviewing agency with the ability to discern whether the responding party either agrees or disagrees in response to the questions asked. Meaningful agency review is precluded, and the rationale for the requirement of independent confirmation is not served. Therefore, we, consistent with the FCC, conclude that recorded touch-tone responses do not satisfy the requirement of “oral” confirmation. While we recognize that in other areas of commerce (e.g., banking or credit), touch-tone answering is becoming more prevalent, the statute does not admit of it for TPVs.

⁷(...continued)

requirements” (id. at 1). This correspondence, however, was forwarded to the Department prior to the FCC’s January 2005 ruling, discussed above, in which the FCC determined that the touch-tone response verification method of Verizon Long Distance did not satisfy the FCC’s requirement for “oral authorization.”

⁸ See In the Matter of Policies and Rules Concerning Unauthorized Changes of Consumers’ Long Distance Carriers, CC Docket 94-129, Report and Order, FCC 95-255, at ¶ 4 (rel. June 14, 1995) (“[Confirmation of verification] provided evidence that the customer had selected that IXC as its long distance telephone company”). Under Massachusetts and federal requirements, a failure to provide such confirmation is evidence in an agency inquiry that authorization of a switch was not obtained from the customer. 220 C.M.R. § 13.03(5); 47 C.F.R. § 64.1150(d) (“Failure by the carrier to . . . provide proof [of verification] will be presumed to be clear and convincing evidence of a violation”).

C. Requirement to Register as TPV Provider

The Massachusetts anti-slamming statute requires that an oral confirmation of authorization of a change in a customer's primary IXC or LEC be "obtained by a company registered with the department to provide TPV services in the Commonwealth." G.L. c. 93, § 109(a). A review of the records on file with the Telecommunications Division of the Department indicate that the TPV service provider used by Verizon in this instance, Interactive Telesis, was not approved by the Department as a registered TPV service provider until May 7, 2004, and, therefore, was unregistered in March 2004 when it recorded the TPV recording at issue in this case.⁹

D. Delay in Execution Of Switch

Although we determine that the previous sections of this Order provide a sufficient basis for concluding that the switch in March 2005 of the Complainant's local telephone service provider was without proper authorization, we offer, for instructive purposes, the following discussion on the length of time between the recording of the TPV and the execution of the switch in this case. For the following reasons, even if we were to determine that the confirmation of authorization provided by Verizon in this case had otherwise been valid, we

⁹ Pursuant to 220 C.M.R. § 1.10(3), the Department incorporates by reference into the record of this proceeding, the registration application of Interactive Telesis in possession of the Department's Telecommunications Division. The registration application is date-stamped with the date the Telecommunications Division received the application (i.e., May 3, 2004) and includes an "approved" date-stamp indicating the date the Telecommunications Division approved the application (i.e., May 7, 2004).

would nonetheless conclude that the delay of one year between the time the TPV was recorded and the time the switch occurred is unreasonable.

Although Verizon argues that its request to AT&T to change the Complainant's local service provider one year after obtaining the TPV is an authorized change simply completed on the wrong date, we do not agree. FCC regulations mandate that compliance with anti-slamming provisions requires an executing carrier to promptly execute, "without unreasonable delay," a carrier change request by a submitting carrier. 47 C.F.R. § 64.1120(a)(2). In addition, a "carrier may be treated as an executing carrier . . . if it is responsible for any unreasonable delays in the execution of carrier changes" 47 C.F.R. § 64.1100(b).¹⁰ Also, we note that the FCC's Consumer Policy Division has recently found that a delay by Qwest Communications of six months in processing a request to change service providers constituted an unreasonable delay in the execution of a switch in violation of FCC rules. See Qwest Communications: Complaint Regarding Unauthorized Change of Subscriber's Telecommunications Carrier, IC No. 04-S88230, Order, DA 05-893, at ¶ 4 (rel.

March 31, 2005). For comparison purposes, we note that, with regard to LOAs, the FCC has established a maximum time period of 60 days in which to submit carrier change requests. See

¹⁰ In this case, Verizon, as the "submitting" carrier, initiated the change in the Complainant's local service provider on March 5, 2005, by contacting AT&T one year after it obtained the TPV that Verizon asserts authorized the switch (Tr. at 43, 56-57). Under FCC rules, a "submitting" carrier is generally any carrier that requests on behalf of a subscriber that the subscriber's carrier be changed, and that seeks to provide retail services to the subscriber. An "executing" carrier is a carrier that effects a request that a subscriber's carrier be changed. 47 C.F.R. § 64.1100(a), (b).

47 C.F.R. § 64.1130(j) (“A telecommunications carrier shall submit a preferred carrier change order on behalf of a subscriber within no more than 60 days of obtaining a written or electronically signed [LOA]”). For these reasons, we conclude that a delay of one year (as in the instant case) would clearly be unreasonable, and that a more preferable maximum time period for execution of a TPV would be comparable to the FCC’s requirement for LOA submission.

E. Conclusion

For the above-stated reasons, we conclude that the switch of the Complainant’s local service provider from AT&T to Verizon on March 5, 2005, was unauthorized. The evidence in this case indicates that Verizon has waived or adjusted all charges to the Complainant resulting from the unauthorized switch in service (Tr. at 44),¹¹ and that Verizon has restored the Complainant’s local exchange provider to his chosen carrier, AT&T (*id.*). No further remedy to the Complainant, therefore, is required to effect a resolution of his Complaint.

However, pursuant to G.L. c. 93, § 112(b), an IXC or LEC determined by the Department to have switched any customer’s IXC or LEC without proper authorization more than once in a twelve month period, shall be subject to a civil penalty not to exceed \$1,000 for the first offense and not less than \$2,000 for any subsequent offense. Given the

¹¹ Although the Complainant at one point stated that \$22.52 was in dispute as a result of the unauthorized switch, he later agreed that this amount was from disputed long-distance charges, and that he did receive a bill from Verizon reflecting a zero balance due to Verizon (Tr. at 28, 34-35, 44, 63).

Department's prior determination of a switching violation in Dunlap v. Verizon, D.T.E. 05-SL-1, at 8 (2005),¹² Verizon is directed to remit to the Department the amount of one thousand dollars (\$1,000.00) as a penalty for the unauthorized switch of the Complainant's local service.¹³

V. ORDER

Accordingly, after due notice, hearing, and consideration, it is

ORDERED: That Verizon New England, Inc., d/b/a Verizon Massachusetts, having caused the switch in John K. Ober's local telephone service provider without authorization and in violation of the provisions of G.L. c. 93, § 109(a), shall comply with the directives contained in this Order; and it is

¹² The Department issued D.T.E. 05-SL-1 on April 1, 2005, in which the Department determined that Verizon had performed an unauthorized switch of the Complainant's long distance service provider. The Department's determination in this Order constitute the second finding of an unauthorized switch by Verizon within a twelve month period as discussed in G.L. c. 93, § 112(b).

¹³ Pursuant to G.L. c. 93, § 112(b), in determining the amount of the civil penalty, the Department shall consider the nature, circumstances and gravity of the violation, the degree of the respondent's culpability, and the respondent's history of prior offenses. Given Verizon's failure to comply with the statutory requirements regarding TPV authorization and registration, and Verizon's recent prior switching violation, the Department determines that a civil penalty of \$1,000 for Verizon's second unauthorized switch within twelve months is appropriate. This penalty is commensurate with penalties imposed by the Department on other carriers that performed a second unauthorized switch within a twelve month period. See, e.g., Delta Marketing v. LCR, D.T.E. 04-SL-13, at 5 (2004); Donnelly v. ADST, D.T.E. 02-29-9, at 5 (2002); Saulnier v. Sprint, D.T.E. 00-22-12, at 5 (2000).

FURTHER ORDERED: That Verizon New England, Inc., d/b/a Verizon Massachusetts, shall submit to the Department within ten (10) business days of the issuance of this order, an accounting of all refunds, credits, and penalties made in satisfaction with this Order.

By Order of the Department,

/s/
Paul G. Afonso, Chairman

/s/
James Connelly, Commissioner

/s/
W. Robert Keating, Commissioner

/s/
Judith F. Judson, Commissioner

An appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of the twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. G.L. c. 25, § 5.

ATTACHMENT A

Transcript of Third Party Verification Recording

D.T.E. 05-SL-10

Exh. DTE-33

TPV CO.: Hello and welcome to the independent, automated third party verification system. At any time during this process, you may press zero to be transferred to a live agent. This call will only take a few minutes. With your permission and to avoid errors, we would like to record this conversation. If you agree to the recording of this conversation, press one, otherwise press two.

RESPONSE: [Beep].

TPV CO.: I have the billing name as John Ober. If this is correct, press one, otherwise press . . .

RESPONSE: [Beep].

TPV CO.: After the tone, please say your first and last name, when finished, press the pound key. [Beep].

RESPONSE: John Ober. [Beep].

TPV CO.: Are you an authorized party allowed to make changes to this account? If yes, press one, ah . . .

RESPONSE: [Beep].

TPV CO.: I have your one telephone number as 508-478-2527. I am now verifying the choice of Verizon as your local service provider and that you have authorized Verizon to provide your local telephone service. If this is correct, press one . . .

RESPONSE: [Beep].

TPV CO.: Your change will only apply to the numbers that you have requested, and only one local service provider may be selected per telephone number. To complete this verification, please say the month and day you were born. For example, if you were born on April 15th, say April 15th. Now, after you hear the tone, say the month and day you were born. When you have finished speaking, press the pound key. [Beep].

RESPONSE: June 25th. [Beep].

TPV CO.: You said June 25th. If this is correct, press one, other . . .

RESPONSE: [Beep].

TPV CO.: Thank you for your time. Your verification is complete and your request will be processed. For Vermont customers, please feel free to call 1-700-4141 to verify that your local toll/regional toll request has been processed or 1-700-555-4141 to verify that your long-distance request has been processed. Thank you for your time and have a pleasant day. Good buh . . .

[End of recording].